IN THE

Supreme Court of the United States

No. 71-703, 1971 Term

UNITED STATES OF AMERICA,

Appellant,

v.

FIRST NATIONAL BANCORPORATION, INC. and
THE FIRST NATIONAL BANK OF GREELEY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF AS *AMICUS CURIAE* FOR THE NEW YORK STATE BANKING DEPARTMENT

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Interest of the New York State Banking Department

The New York State Banking Department is responsible for regulating state chartered banks and for passing upon bank holding company acquisitions and mergers in the State of New York.[1] As a bank regulator, the Department is charged under law with securing the broad public interest of having a solvent, efficient and competitive banking system in New York. The Department believes that vigor-

[1] See Articles III, III-A and XIII of the New York Banking Law.

ous competition among commercial banks is important in protecting the interest of the public.[2]

New York State has many of the largest banks in the United States, located primarily in New York City. While the expansion of these banks and their holding companies into other markets in the state has been authorized by the Banking Department when deemed pro-competitive, the Department at the same time has been concerned that a few of the largest such banking organizations not come to dominate banking throughout the state. To this end, the Department has sought to exercise careful supervision over the expansion by acquisition or merger of bank holding companies and of banks subject to its jurisdiction. In doing so, it has relied heavily on the potential competition standard which is at issue in this case.

As a state bank regulatory agency, the New York State Banking Department is not itself bound to enforce federal antitrust laws. On the other hand, as this Court has repeatedly recognized, the competitive principles of the antitrust laws represent an important ingredient in the broader public interest which this Department, like other regulatory agencies, is charged with enforcing.[3]

Moreover, the New York Banking Law (Sections 142 and 601-b) mandates that in determining whether to approve or deny a proposed merger or acquisition, consideration shall be given to whether it would ". . . result in a concentration of assets beyond limits consistent with effective competition . . ." or whether it ". . . may result in such a lessening of competition as to be injurious to the

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[2] See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 372 (1963).

[3] *United States* v. *Radio Corporation of America*, 358 U.S. 334, 351 (1959); *Denver & R.G.W.R. Co.* v. *United States*, 387 U.S. 485, 492-493 (1967); *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243-246 (1968); See also *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 189 (1968).

nterest of the public or tend toward monopoly . . ." and ". . . primarily, the public interest and the needs and convenience thereof." The Department therefore has an nterest in the development and application of sound anti-rust principles which reflect the actual competitive and ther realities of commercial banking.

This Department submits this brief as a state agency xperienced in the field of bank regulation and in the pplication of the potential competition standard to bank cquisitions and mergers. The views expressed herein on otential competition reflect our actual experience and he results of empirical studies conducted by our economic taff. The Department's experience and studies are, we elieve, relevant to the disposition of this case.

Summary of Argument

This case raises before this Court the question of the pplicability of a potential competition standard in the anking industry. The standards defined here will have mportance far beyond the state of Colorado and the par-icular facts of this case.

The Court has dealt with the concept of potential com-etition in a number of merger decisions in other fields nder Section 7 of the Clayton Act.[4] This Court has made lear that preserving potential competition is important in he case of a market of few sellers, where actual competi-ion is necessarily limited. This point was stressed by this Court in *Penn-Olin*:[5]

[4] See *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *United States* v. *Continental Can Co.*, 378 U.S. 441, 464-465 (1964); and *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

[5] *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158-174 (1964).

> "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."

Accordingly, this Court has found that Section 7 of the Clayton Act proscribes acquisitions which eliminate significant potential competition to companies in concentrated markets. These Section 7 violations (except for *Penn-Olin*) have involved a potential competitor and a market leader in a concentrated market.

While the potential competition standard is well recognized among economic scholars, it can be a difficult concept to apply. This Court clearly recognized this reality in *Penn-Olin* when it said, "Potential competition cannot be put to a subjective test. It is not 'susceptible of a ready and precise answer'." (378 U.S. at 174).

Based on our experience with respect to commercial banking, however, we believe that potential competition is a workable concept and that it is appropriate to apply it to that field.

First, local commercial banking markets in New York and elsewhere often are characterized by a high degree of concentration, with consumers confined to a relatively small number of effective choices. For example, in all six of the standard metropolitan statistical areas in upstate New York, the four largest banks have over 75% of total commercial bank deposits; and in three of these areas such concentration exceeds 90%. In smaller communities effective choices are generally even more limited, and market concentration is often even higher.[6] Even in markets which are not quite as highly concentrated, actual competition is often limited by the lack of sufficient effective alternatives.

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[6] See *United States* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970).

Secondly, apart from its relevance to local or adjacent arkets, potential competition is an important policy tool dealing with questions of competition on a statewide sis where the markets involved are distant from each ner. The threat is present in New York and many other ates that banking there could become dominated by a very v large organizations. This threat would materialize if e largest banking organizations in a state were per-tted to buy up, without restriction, the larger banks in al markets within the state. The end result would be at a handful of banking organizations would control the ding market positions in all the significant markets in e state.

The New York State Banking Department has sought to al with this potential danger during the past decade by ying heavily on the potential competition standard, cognized by this Court and economic scholars, to deal th proposed acquisitions by the state's leading banks of e larger banks in various local markets. The importance the potential competition criterion in this context was essed in 1970 by Frank Wille, then New York Superin-dent of Banks and now Chairman of the Federal Deposit surance Corporation:

> ". . . the potential competition standard may be the only criterion available to the bank regulatory agencies or the courts by which a trend toward a market dominated by only a handful of banks or bank holding companies may be checked."[7]

The extensive use of the potential competition standard New York State, both by the State Banking Department d the Federal Reserve Board, has provided a clear nonstration that potential competition is *in fact* a work-e standard in banking. By virtue of these regulatory

[7] Foreword to *Potential Competition: Unfounded Faith or Prag-tic Foresight?* by Ernest Kohn and Carmen J. Carlo, New York te Banking Department, 1970.

agency decisions, large potential entrants have been denied the opportunity to enter the New York City suburbs and larger upstate markets by means of acquisitions of the larger local banks. This, however, has not prevented them from entering these markets. In most cases, they have entered them by the means open to them—*de novo* branching or acquisition of smaller banks in local markets.

As a result of this process, in the great preponderance of cases, *potential* competitors have within a relatively short time become *actual* competitors of the local banks they sought and were unable to acquire. Accordingly, more diverse and competitive banking markets have developed than otherwise would have existed in New York.

I. Extensive Experience in New York Illustrates the Basis for Applying a Potential Competition Standard in Commercial Banking

The New York State Banking Department has for many years been concerned with the potential competition standard and has had extensive experience in applying it. About two years ago, the Department published the results of a study[8] it had made of potential competition, hereinafter referred to as the "Study". The Study concluded that it is highly probable that potential competitors will become actual competitors in a local market, if prevented from entry by affiliation with leaders in the market.

Since its publication, events have taken place in the New York banking industry which confirm and strengthen the conclusions of the Study. These events, together with those reported in the Study, are summarized in the Table on pages 10-17 of this brief, hereinafter referred to as "Table".

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[8] *Potential Competition: Unfounded Faith or Pragmatic Foresight?* by Ernest Kohn and Carmen J. Carlo, New York State Banking Department, March 1970.

The comments which follow on the importance of potential competition in commercial banking are based on the Study and on later developments reported in the Table.

A. The Structure of Banking in New York State

In the State of New York, commercial banks may branch or merge within the banking district in which they are headquartered. The state is divided into nine multi-county banking districts. Bank holding companies may acquire banks in different banking districts.

Most local banking markets in New York as well as in many other states throughout the country are already characterized by extremely high degrees of concentration. As previously indicated, in all six of the standard metropolitan statistical areas (SMSA) in upstate New York, the four largest banks have over 75% of total commercial bank deposits. In three of these areas, the share exceeds 90%.[9] These markets are typical of the high degree of concentration which tends to exist in local banking markets throughout the country.[10]

B. New York Experience in Banking Shows That Potential Competition Usually Becomes Actual Competition: In the Preponderance of Cases Where Applications Were Disapproved in Which Potential Competition Was Relevant, Institutions Involved Did Come Into Actual or Increased Competition With Each Other in a Relatively Short Time Period

The New York Legislature's passage of the Omnibus Banking Law of 1960-61 permitted New York City-based

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[9] The comparable figure for the New York City SMSA is 53%.

[10] See, for example, the data by SMSA on the deposit shares held by the largest banks in *Summary of Accounts and Deposits in All Commercial Banks,* Federal Deposit Insurance Corporation, June 30, 1970.

banks to branch *de novo* into, or merge with banks headquartered in, Nassau and Westchester Counties which adjoin New York City. The Law also established more specific criteria for the formation and expansion of multi-bank holding companies and was followed by rapid holding company growth beginning in 1966. Through a holding company, a bank located in one of the state's nine geographical banking districts can enter any other district by affiliation with a bank located there.

The Department's Study focused on the after-effects of the 13 disapprovals of proposed bank mergers and holding company acquisitions which occurred in New York in the three-year period 1961 through 1963.[11] All disapprovals were considered regardless of whether the institutions involved were explicitly identified as potential competitors at the time their applications were denied. Analysis was subsequently made of 10 additional disapprovals, from the beginning of 1964 through the end of 1970, and their after-effects as well.

The Study indicated that potential competition became actual competition in 10 of the 13 disapproved applications (or 77%) for the period 1961-1963. In the 10 subsequent cases covering the period 1964-1970, potential competition became actual competition in seven cases (or 70%). However, even this relatively high ratio *understates* the probability that potential competition will become actual competition since insufficient time has elapsed to provide a completely adequate test.[12]

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[11] *Disapproved* applications provide the most meaningful test of the probability that potential competition will become actual competition. The reason that *approved* applications are not relevant in this context is that once a merger or acquisition has been approved and consummated, the necessity for a bank to seek entry into that area by other means, or for the "sought-after" bank to seek an alternative affiliation, is effectively eliminated.

[12] Three of the 10 cases denied involved proposed mergers in 1968, 1969 and 1970, respectively.

sidering applications denied in the entire period 970, potential competition became actual competition % (17 out of 23) of the cases. Analysis of these 17 summarized in the Table, confirmed the original find- f the Study:

Every case involved a proposed merger or acquisition elatively large banking organization.

The banks which they unsuccessfully sought to merge uire ranged in size from very small to very large.

Within the space of a relatively few years (averag- out three and one-half years) after the disapproval regulatory authorities, the institutions involved in oposal came into competition with each other or be- more effective competitors, and the competitive ire of the area was significantly improved.

This occurred as a result of: (a) the large bank ex- g into the other's area through *de novo* branching uiring a much smaller institution and converting it more effective competitor, or (b) the "sought-after" eing acquired by a different institution which pre- had little or no representation in the area thereby thening the competitive capabilities of the acquiring tion, or (c) the "sought-after" bank helping to or- a new holding company which competes in various of the State with affiliates of the large bank which iginally sought to acquire it.

Most of the "sought-after" banks had some of their in rapidly growing suburban areas where additional ing activity is likely in the future. As a result, the of actual competition which has developed between stitutions involved can be expected to increase fur- the years ahead.

eover, only two of the six cases where potential com- n has not yet become actual competition out of the es analyzed involved a leading bank holding com- acquisition of a major bank in a local market. The our cases involved large banks which sought mergers tively small banks in small communities where the

larger banks could not branch because of home office protection.

SUMMARY TABLE

POTENTIAL CONVERTED INTO ACTUAL COMPETITION

Applications Denied 1961	*Actual Competition Realized* 1968
1. Holding company affiliation of Bankers Trust Company (sixth largest bank in New York City) and County Trust Company (largest bank in Westchester County adjoining New York City). (Denied by State Banking Board—see Annual Report of the Superintendent of Banks, 1961, pp. 44-62)	Bankers Trust of New York City entered Westchester County, where County Trust is located, by merger in 1968 with a bank much smaller than County Trust, and subsequently opened a *de novo* branch there. Bankers Trust's nine Weschester branches now compete with 54 County Trust offices in Westchester. The two banks are also part of different holding companies now competing in other sections of the state.
1962	1962
2. Merger of First National City Bank (second largest bank in New York City) and National Bank of Westchester (second largest bank in Westchester County adjoining New York City). (Denied by Comptroller of the Currency—see Annual Report of the Comptroller of the Currency, 1962, pp. 138-146)	First National City Bank of New York City entered Westchester County starting in 1962 by *de novo* branching. Its 21 Westchester branches now compete with 32 offices of National Bank of Westchester. The latter is now affiliated with a smaller holding company.

Applications Denied	*Actual Competition Realized*
1962	1963
Merger of Chase Manhattan Bank (largest bank in New York City) and Hempstead Bank (third largest bank headquartered in Nassau County adjoining New York City). (Denied by Federal Reserve Board—see Federal Reserve Bulletin, May 1962, pp. 544-548)	Chase Manhattan Bank of New York City entered Nassau and Suffolk Counties, where Hempstead Bank's offices are now located, by *de novo* branching starting in 1963 and by establishing a new bank. Its 10 Nassau County offices and its Suffolk County affiliate now compete with 25 offices of Hempstead Bank.
1962	1963
Merger of Chemical Bank (fifth largest bank in New York City) and Long Island Trust Company (second largest bank headquartered in Nassau County adjoining New York City). (Denied by Federal Reserve Board—see Federal Reserve Bulletin, May 1962, pp. 548-555)	Chemical Bank of New York City entered Nassau and Suffolk Counties, where Long Island Trust's offices are located, by *de novo* branching and by merger in 1963 and affiliation with two banks whose combined size was much smaller than Long Island Trust. Chemical's 13 Nassau County branches and its 5 Suffolk County offices now compete with 26 Long Island Trust offices.
1962	1968
Holding company affiliation between Marine Midland (then the largest multibank holding	Marine Midland of New York City entered Nassau and Suffolk Counties, where Security National's

Applications Denied 1962	*Actual Competition Realized* 1968
company in New York State with affiliates in New York City and other major cities upstate) and Security National Bank of Long Island (the largest bank headquartered in Suffolk County). (Denied by Federal Reserve Board—see Federal Reserve Bulletin, December 1962, pp. 1597-1608)	offices are located, by *de novo* branching starting in 1968 and by merger and affiliation with two banks whose combined size was much smaller than Security National. Marine's 18 Nassau and Suffolk County offices now compete with 65 offices of Security.
1962	1967
6. Holding company affiliation between Morgan Guaranty Trust Co. (the fourth largest bank in New York City) and six leading banks in major cities throughout upstate New York. (Denied by Federal Reserve Board—see Federal Reserve Bulletin, May 1962, pp. 567-582)	Five of the banks involved in the proposed formation of this holding company are important members of three separate and competing holding companies, the first of which was established in 1967.
1961	1969
7. Merger of State Bank of Albany (the largest bank in the Albany district) and Fulton County National Bank (second largest independent	Fulton Bank, acquired by Charter holding company in 1969, competes more effectively with State Bank of Albany in Fulton County.

Applications Denied	*Actual Competition Realized*
bank in Fulton County northwest of Albany)* (Denied by Superintendent of Banks)	
1961	1963
8. Merger of Manufacturers and Traders Trust Company (the second largest bank in the Buffalo district) and State Bank of Newfane (the last remaining independent bank in Niagara County which adjoins the Buffalo area)* (Denied by Superintendent of Banks)	Subsequent merger of Newfane bank into Liberty National Bank of Buffalo in 1963 resulted in more effective competition in the Newfane area with Manufacturers by replacing Newfane bank with a stronger competitor.
1962	1963
9. Merger of County National Bank (the largest bank headquartered in Orange County) and National Bank of Port Jervis (a small unit bank in Orange County)* (Denied by Comptroller of the Currency — see Annual Report of the Comptroller of the Currency, 1962, pp. 153-154)	Subsequent merger of Port Jervis bank in 1963 resulted in more effective competition with County National Bank in the Port Jervis area.

* Denial based in part on elimination of existing competition. or details, see the Study.

Applications Denied 1963	*Actual Competition Realized* 1969
10. Merger of Manufacturers and Traders Trust Company (the second largest bank in the Buffalo district) and Bank of Jamestown (the third largest bank in the City of Jamestown about 70 miles south of Buffalo). (Denied by Superintendent of Banks—see Annual Report of the Superintendent of Banks, 1964, pp. 19-21)	Jamestown bank, acquired by Bankers Trust holding company in 1969, now competes more effectively with Manufacturers and Traders Trust Company in Chautauqua County.
1965	1970
11. Merger of Chemical Bank (the fourth largest bank in New York City) and First National Bank in Yonkers (the fourth largest bank headquartered in Westchester County adjoining New York City). (Denied by Superintendent of Banks—see Annual Report of the Superintendent of Banks, 1965, pp. 25-35)	Yonkers bank, located in Westchester County, merged in 1970 into another New York City bank much smaller than Chemical resulting in more effective competition with Chemical's other Westchester County branches. In addition, Chemical Bank entered the City of Yonkers starting in 1971 by establishing two new branches within several blocks of Yonkers bank's offices.
1967	1969
12. Holding company affiliation between Bankers Trust Company (the sixth largest bank in	Bankers Trust holding company, by acquiring Bank of Jamestown in 1969, now competes with

Applications Denied 1967	*Actual Competition Realized* 1969
New York City) and Liberty National Bank (the third largest bank in the Buffalo district). (Denied by Federal Reserve Board—see Federal Reserve Bulletin, May 1967, pp. 769-774)	Liberty bank of Buffalo in Chautauqua County. Also, Liberty subsequently became part of upstate-based holding company which competes with Bankers Trust affiliates in other areas.
1967	1969
Holding company affiliation between Marine Midland Banks (then the second largest multibank holding company in New York State with affiliates in New York City and other major cities upstate) and First Westchester National Bank (the third largest bank headquartered in Westchester County adjoining New York City). (Denied by State Banking Board—see Annual Report of the Superintendent of Banks, 1967, pp. 50-58)	A Marine Midland holding company affiliate entered Westchester County by *de novo* branching starting in 1969. Its six Westchester branches now compete with First Westchester's 17 offices.
1968	1970
Affiliation between Charter holding company (whose lead bank is Irving Trust Company, the seventh larg-	Part of Central Trust in the Rochester area was "spun off" and acquired by Bankers Trust holding company in 1970 bringing

Applications Denied	*Actual Competition Realized*
1968	1970
est bank in New York City) and Central Trust Company (the fourth largest bank in the Rochester district). (Denied by Federal Reserve Board—see Federal Reserve Bulletin, November 1968, pp. 925-932)	that portion of Central into competition with Charter holding company which acquired the rest of Central Trust.
1969	1971
15. First Empire State holding company affiliation involving four banks, in widely separated cities throughout New York State, which ranked as the largest or the second largest banks headquartered in these cities. (Denied by Federal Reserve Board—see Federal Reserve Bulletin, September 1969, pp. 738-743)	Two separate and competing holding companies, the first of which was formed in 1971, have been established by three of the banks involved.
1970	1972
16. Affiliation of Bankers Trust holding company (whose two largest affiliates are Bankers Trust Company, the sixth largest bank in New York City, and	Troy bank, located in a city near Albany, was acquired in 1972 by the Charter holding company. As part of the same transaction, Charter established a new bank in Al-

Applications Denied	*Actual Competition Realized*
1970	1972
First Trust of Albany, the third largest bank in the Albany district) with Union National Bank of Troy (the second largest bank headquartered in the city of Troy which is near Albany). (Denied by State Banking Board—see Annual Report of the Superintendent of Banks, 1970, pp. 74-83)	bany which was merged with Troy bank, thereby coming into direct competition with Bankers Trust's subsidiary in Albany.
1970	1972
Affiliation of Charter holding company (whose lead bank is Irving Trust Company, the seventh largest bank in New York City) with Hempstead Bank (the third largest bank headquartered in Nassau County adjoining New York City). (Denied by State Banking Board—see Annual Report of the Superintendent of Banks, 1970, pp. 111-120)	Charter entered Nassau and Suffolk Counties, where Hempstead Bank's offices are located, by acquiring the Bank of Babylon in 1972 which is much smaller than Hempstead Bank and competes with it.

NOTE: Branch statistics are as of latest available date.

C. Probability Is High that Institution Seeking Merger or Acquisition Will Enter the Market by Alternative Means If Its Original Proposal Is Denied

Any case involving potential competition raises the question of whether the institution seeking a particular merger or acquisition would be likely to enter the area by other means if its proposal is denied.

The experience in New York State summarized in the foregoing evidence indicates the probability is very high that a banking organization which has sought to enter a market by merger with or acquisition of a leading bank there will seek to enter that market by alternative means if its original proposal is denied, thus converting potential competition into actual competition within a reasonably short period of time. Large banking organizations—especially the largest such organizations in a state—are not easily discouraged. If blocked from entry by one method into an attractive market, they are quite likely to seek alternative means of entry.

Moreover, neither self-serving statements by a bank that it does not intend to enter the market by other means nor the absence of prior evidence of such intent is a valid basis for concluding that it would not seek alternative means of entry if the proposed merger or acquisition were denied. This is so for two reasons:

1. If banks know that the regulatory agencies and/or the courts will permit mergers or acquisitions if there is no prior evidence of their intent to enter a market by alternative means, this will create an incentive to studiously avoid any action which would generate such evidence.

The New York State experience indicates that skepticism in this context is justified—and for a very sound reason: Alert and aggressive bank managements are concerned about strengthening their institution's competitive capabili-

, improving its profitability and attempting to keep pace
a the growth and geographical expansion of its major
petitors. It is highly unlikely that they will forego
itable opportunities for expansion into attractive
kets merely because their first and preferred vehicle for
y has been sidetracked. In most situations, they have
luded that alternative entry is preferable to no entry at

Knowledgeable bankers are aware that taking over a
g concern by merger or acquisition, particularly if one
not have to pay too substantial a premium for its
k, is quicker, less expensive and more profitable than
ding a branch system *de novo*. Similarly, acquiring a
er bank is usually preferable to acquiring a smaller one
iew of the greater amount of deposits, assets, branch
rage and profit potential thereby obtained. Hence, so
as merging or acquiring a larger bank is available as a
ns to enter a market, why should a bank devote time,
rt and expense to analyzing the alternatives of *de novo*
ching, acquiring a smaller bank, or chartering a *de novo*
there? This would be necessary only when the
ously easier and more profitable means of entry was
onger open. As is apparent from many of the New
k cases examined, only then will alternative ways of
ring a market be seriously considered and acted upon.

. The Choice of Alternative Means of Actual Entry Depends on the Nature of the Market Involved

he New York experience indicates that a large bank
bank holding company is very likely to seek alternative
ns of entry into an area if its initial merger or
isition proposal is denied. Since the "second best"
ns of entry is usually preferable to no entry at all, such
nizations are not likely to forego such opportunities
expansion.

The "second best" entry route for such a bank may be either by establishing branches in the area, if that is legally possible, or by acquiring a bank much smaller than the one originally sought, or by causing a new bank to be chartered there. In determining whether *de novo* entry is a likely or feasible alternative, the economic characteristics of the area must be considered. The New York experience indicates that suburban areas, with their relatively high level of per capita income and their potential for future population and economic growth, tend to be extremely attractive markets. If denied access by other means, a large banking organization is likely to seek entry by opening new branches—thereby converting potential into actual competition. In areas where *de novo* entry is not feasible, the New York experience indicates that large banks will seek to acquire relatively small banks if they are unsuccessful in their attempt to acquire larger ones.

E. Alternative Affiliations are Usually Open to the Sought-after Bank

Another question frequently encountered in potential competition cases concerns the probability that a proposed merger or acquisition is the only feasible one for a small or moderate-size bank wishing to be acquired.

The New York State experience suggests that when a small or moderate-size bank is denied permission to merge or to be acquired by a large organization, it can seek and find alternative affiliations. The reason for this is that the same factors that made the bank (including its market) attractive to one partner are likely to make it desirable to another.

Thus, 10 of the disapprovals cited in the Table during the period 1961-1970 involved banks with less than $75 million in assets at the time they sought to merge or affiliate with a larger banking organization. Seven of these banks had less than $20 million in assets. In seven of the

10 cases involving banks under $75 million, and in five of the seven cases under $20 million, the bank subsequently merged or affiliated with another institution.

II. The Importance of Potential Competition in Banking

A. Avoidance of Statewide Dominance by a Few Banking Organizations

Federal law generally confines a bank or a bank holding company to operations in a single state.[13] This protects the country as a whole from a highly concentrated banking industry on a national scale (as for instance exists in Great Britain or Canada). At the same time, however, it protects the banks of a particular state from much outside competition and thereby enhances the risk that a few banks *within a state* will come to dominate banking in local markets throughout the state.

The potential competition standard is essential to dealing with the threat of domination of banking in a state by a few institutions which control most or all leading banks in the state's major banking markets.

If, for example, two or more large banks located in different areas of the State seek to merge or affiliate, no existing competition would be eliminated since banks' service areas generally tend to be limited to the communities (and environs) in which their offices are located. However, such a merger forever forecloses the possibility that they could come into competition by branching into each other's service area or by merging or affiliating with small banks located in each other's area. Failure to apply the potential competition standard in such situations

[13] 12 U.S.C. 36, 1842(d).

would encourage other similar affiliations between large banks located in different markets. Such a pattern of affiliations would eventually lead to domination of the entire state by a relatively few large banking organizations.

Moreover, even affiliations between large banks and small or moderate-size banks may contribute to statewide dominance by a few large institutions. In view of the localized nature of banks' service areas, a large banking organization could continue to seek additional mergers or acquisitions in selected, separated communities without ever eliminating a substantial degree of *existing* competition. This could be accomplished by means of a "leapfrogging" pattern of mergers or acquisitions in one community after another, skipping a community or two in between in order to avoid any overlap of service areas and thereby ensure that substantial existing competition is not eliminated. The end result of this process would also be that banking concentration among a relatively few large institutions in the state would increase—unless prevented by use of the potential competition standard.

A question might be raised, however, as to why—if banks' service areas are localized and therefore largely non-competing—these patterns of acquisition by the largest banking organizations in a state are undesirable. Such patterns are objectionable on the following grounds:

1. They restrict the opportunities for entry and expansion by smaller banking organizations (including smaller holding companies) whose growth should be encouraged if they are to be able to compete more effectively with the larger institutions in the state for the business of those customers who need more specialized services than the smaller institutions are able to provide.

Because of their limited size, smaller banking organizations generally are not able to offer as wide a range of

vices as larger institutions, usually cannot afford as ensive an advertising program and are likely to find it e difficult to attract qualified management personnel. tates where a few large banking organizations already e a large share of commercial banking resources—ch is characteristic of many states throughout the ntry—options for merger and acquisition should be kept lable to permit smaller banking organizatons to grow become more competitive. If this is not done, potential petition is being eliminated since the expansion and elopment of smaller institutions is being limited and may be largely foreclosed.

vents in recent years in New York State have empha-d the importance of retaining options for expansion of ller banking organizations. In the past six years, four multi-banking holding companies have been formed h a fifth in process of formation)[14] in which the lead ts were headquartered in upstate New York. If these ate-based holding companies are to be strengthened ive to the larger New York City-based holding com-es, opportunities for them to acquire affiliates should reserved so that these smaller organizations can con-e to grow and expand into areas where they are not represented.

is relevant in this context that the larger banking nizations have the resources to be able consistently to id their smaller competitors by offering larger pre-ns for the stocks of the banks they wish to acquire. ire to apply the potential competition standard is fore likely to cause banks wishing to be acquired to itate towards the largest banking organizations in the

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The five holding companies and their year of formation are: ity New York State Corporation (1966), Lincoln First Banks 1967), United Bank Corporation of New York (1971), First nercial Banks Inc. (1971) and First Empire State Corporation).

state, thereby limiting the growth and expansion opportunities necessary to strengthen smaller banking organizations.

2. Dissatisfied bank customers in any particular area would find that they had fewer potential alternatives available to them since adjoining areas would contain offices of the same few banking institutions represented in their own area. Although bank customers generally do business locally, some—particularly business or farm loan customers—may need to seek credit in areas outside of, although near, their own. If, however, the same few statewide banking organizations are dominant in one area after another, the choices available for such customers will be unduly restricted.

3. Permitting large banking organizations to merge or acquire subsidiaries eliminates the incentive for them to expand, by *de novo* branching, into suburban areas of economic growth potential or other areas where branching opportunities exist and will continue to develop in the future. Such branching would intensify competition while at the same time retaining local banks as competitive alternatives.

B. Deconcentration of Concentrated Local Banking Markets

The relationship between the potential competition standard and the opportunity to deconcentrate highly concentrated local banking markets is also important.

As previously noted, most local banking markets in New York as well as in many other states throughout the country are already characterized by very high degrees of concentration. Merger and acquisition applications, therefore, should be considered from the standpoint of whether they move in the direction of reducing tendencies toward monopoly and of promoting increased competition and consumer choice. Failure to apply the potential competition

ndard, thus permitting large aggressive institutions to quire the larger local independent banks with which they not now compete, would foreclose opportunities for h deconcentration since:

1. It would eliminate the incentive for large banks to k alternative means of entry into those markets by *de vo* branching, acquiring a relatively small institution, or artering a new bank. Any of these alternatives would en- nce competition and help to deconcentrate markets—her by introducing new competitors into the market or converting a small bank into a more effective competitor the large institutions already in the area.

2. It would limit the options for expansion by smaller nking organizations which would, because of accretions size and the related advantages previously discussed, p make them more effective competitors in this as well in other markets throughout the state where they come o competition with larger banking organizations.

In short, by application of the potential competition ndard, the incentive for entry by alternative means is ained, the opportunity for deconcentration of highly con- ntrated banking markets is preserved, and the proba- ity exists that a healthier competitive banking structure l result.

. Conclusion

In the original *Philadelphia National Bank* case, the de- dants argued that the competitive policies of federal ti-trust laws were not directly applicable to mergers be- een two competing commercial banks. This Court flatly ected this argument, saying, "The fact that banking is ighly regulated industry critical to the Nation's welfare kes the play of competition not less important but more " 374 U.S. at 372.

With respect to proposed bank mergers or bank holding company acquisitions, potential as well as actual competition should be considered in judging the total competitive effect of an application.

The standard of potential competition may be difficult to employ in some product markets but reasonably applied to the period of bank and bank holding company expansion in New York State, it has been a realistic—indeed an indispensable—criterion. Experience in New York is that once denied entry into a market through a large acquisition, the probability is high that banks and bank holding companies—particularly the largest such organizations in the state—will later enter that market by other means and become actual competitors.

Accordingly, we urge that this Court recognize that a bank holding company acquisition which eliminates significant actual or potential competition is illegal under Section 7 of the Clayton Act. In defining standards of illegality, while aware that potential competition is not "susceptible to a ready and precise answer",[15] the Court should recognize that significant potential competition is generally eliminated when one of the largest banking organizations in a state seeks to enter a significant local market in that state through acquisition of one of the local market leaders.

Respectfully submitted,

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[15] *Penn-Olin, supra* at 174.